

## APPENDIX F

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CHAPTER 40B TASK FORCE  
FINAL MINUTES OF THE MAY 5, 2003 MEETING

**Agenda**

Chapter 40B Task Force

May 5

10 am to 12:30 pm

- Introductions
- Approve the minutes
- Distribute data
- Presentation by Bennet Heart on Smart Growth and 40B

**Community Impact & Community Needs**

- Establish density limitations
- Change “cooling off” regulation so that it operates both ways, at the community’s option
- Allow project administrator to reprimand developers acting in bad faith
- Recommend offsetting municipal impacts through changes in the local aid formula, provide new local aid for housing growth (or affordable housing growth), adjust School Building Assistance, Chapter 70 and 90.
- Planned production and linking planning to Chapter 40B (time-off for planning)

**Profits**

- Establish guidelines for allowable acquisition cost for land so that acquisition costs cannot be used to inappropriately inflate profits
- Limit profits to 10% or 15%
- Allow for third party approval of pro formas
- Require independent appraisal
- Require financial evaluation of each additional unit over the number of by-right units

**Composition of 40B Developments**

- Require an income band in 40B developments to serve lower income people
- Make housing funds available outside of the competitive funding process to help cities and towns negotiate enhanced affordability
- Require a higher percentage than 25% affordable
- Direct money going directly to the project under certain circumstances such as if three bedroom units are built.

**Changes outside of 40B that can reduce the use of Chapter 40B**

**CPA**

- Support increasing the minimum percentage of funds to be used for affordable housing
- Support changing the CPA to allow for cities and towns to set aside a pot of money to purchase units when they become available
- Support allowing for the pooling of CPA funds to be used for affordable housing

Commission Members:

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Jane Wallis Gumble	Task Force Chair, Director, DHCD
Fred Habib	Facilitator, Non-Voting member, Deputy Director, DHCD
Mark Bobrowski	Municipal Consultant, Professor, New England School of Law
Senator Harriette Chandler	Senate Chair, HUD Committee
Jack Clarke	(Absent) Director of Advocacy, Massachusetts Audubon Society
Howard Cohen	Board Member, Citizens Housing & Planning Association
Representative Michael Coppola	Massachusetts House of Representatives
Marc Draisen	(Absent) Executive Director, Metropolitan Area Planning Council
<i>Represented by Judith Alland</i>	
Steve Dubuque	President, Massachusetts Non-Profit Housing Association
Representative Robert Fennell	(Absent) Vice Chair, HUD Committee
Thomas Gleason	(Absent) Executive Director, MassHousing
Bennet Heart	Attorney, Conservation Law Foundation
Representative Kevin Honan	House Chair, HUD Committee
Michael Jaillet	MMA Housing Subcommittee
Al Lima	Planning Director, City of Marlborough
Bill McLaughlin	President, Rental Housing Association of the GBREB
Kathleen O'Donnell	Attorney, Kopelman & Paige
Gwen Pelletier	Board Member, Massachusetts Association of CDC's
Mayor Sharon Pollard	(Absent) City of Methuen
Jeff Rhuda	Homebuilders Association of Massachusetts
Representative Harriett Stanley	Massachusetts House of Representatives
Senator Bruce Tarr	HUD Committee
Senator Susan Tucker	Massachusetts Senate
Senator Dianne Wilkerson	Massachusetts Senate
Clark Ziegler	Executive Director, Massachusetts Housing Partnership

Attendees (as documented on the sign-in sheet):

Art Bergeron	
Roger Blood	Brookline Housing Advisory Board
Karen Bresnahan	DHCD
Steve Burrington	Office for Commonwealth Development
Joy Conway	Greater Boston Real Estate Board
Ben Fierro	Lynch and Fierro LLP
Doug Foy	Office for Commonwealth Development
Anne Marie Gaertner	DHCD
Kurt Gaertner	DHCD
Aaron Gornstein	CHAPA
Paul Haverty	Regnante, Sterio and Osborne, LLP
Judy Levenson	AGO
Jacques Morin	Bayberry Building
Chris Norris	CHAPA
Kristen Olsen	DHCD
Sotir Papalilo	Westwood Associates
Kate Racer	DHCD

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*Attendees Continued*

Ted Regnante, Esq	Regnante, Stereo & Osborne
Bill Reyelt	DHCD
Lynn Sweet	LDS Consulting Group, LLC
Anne Tate	Office for Commonwealth Development
Sarah B. Young	DHCD

Materials Distributed:

Comments From the Town of Concord  
Comments From Frank Puopolo  
Testimony of Frank Puopolo  
Comments from Sortir Papalilo  
Comments From Jacques Morin  
Harbor Glen Associates V. Board of Appeals of the Town of Hingham  
Chapter 22

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Introductory Remarks & Adoption of April 28, 2003 Minutes:

Fred Habib, Task Force Facilitator and Deputy Director for DHCD brought the meeting to order at 10:00 AM, and asked those in attendance to introduce themselves. He then asked Task Force members to direct their attention to the Draft Minutes of the April 28, 2003 meeting and asked if anyone would like to recommend changes.

Attorney Kathleen O'Donnell noted that she had submitted an e-mail with suggested changes. As copies of her email had not been distributed to Task Force members, it was decided that DHCD would make copies during the course of the meeting and the Task Force would return to the adoption of the Draft Minutes with her comments. *Please note that time did not permit for the Task Force to return to the Draft Minutes of the April 28, 2003 meeting and they will be addressed at the May 12, 2003 meeting.*

Mark Bobrowski Municipal Consultant and Professor, New England School of Law, distributed handouts to Task Force members from a symposium at Boston College.

Mr. Habib noted that the smart growth and planned production discussion had been moved to the May 12<sup>th</sup> meeting and that if time allowed the Community Preservation Act would be discussed today.

Community Impact & Community Needs

*Establish Density Limitations*

Clark Ziegler, Executive Director of the Massachusetts Housing Partnership Fund, noted that the guidelines for density limitation under the Homeownership Opportunity Program (HOP) in the late 80s early 90s was 8 units per acre, or 4 times the surrounding density, whichever was greater. He added that this was a guideline and there was always room for case-by-case evaluations. He noted that he did not recall adopting any proposals for density limitations on rental development.

Representative Michael Coppola asked Mr. Ziegler how the HOP density guidelines worked.

Mr. Ziegler noted the establishment of a standard seemed to calm much of the controversy. He added that people generally accepted the standard and lived with it, though not all were happy.

Steve Dubuque, President of the Massachusetts Non-Profit Housing Association noted that at the same time local housing partnerships were active in many communities, so developers were going to the partnerships before ZBAs. He added that this resulted in developers having already discussed many of the issues that the ZBA would need to review, which was quite helpful.

Representative Michael Coppola noted that he supported setting a standard, and that he believed most communities would be able to accept the 8 units per acre that Mr. Ziegler had discussed. He added that he would like to see a situation where the standard would be a minimum, so that communities could do higher density if they wanted.

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Bill McLaughlin, President of the Rental Housing Association of the GBREB, expressed concern about setting density limitations. He noted that he would prefer establishing density guidelines or a “safe harbor” rather than limitations. He suggested that if a developer wanted to build at a higher density than the guidelines, they should prove the need for higher density. He then asked Task Force members to keep in mind that lower density results in more sprawl and increased infrastructure costs.

Mr. Habib asked Mr. McLaughlin if he had any specific suggestions for these guidelines.

Mr. McLaughlin suggested that 10-12 units per acre for rental would be acceptable, and that in some cases, such as mixed use, the density would be higher.

Jane Wallis Gumble, Task Force Chair and Director of DHCD, noted that in order to help communities, some known rules need to be established.

Mr. Ziegler noted that as he recalled, once density guidelines were in effect for HOP, the projects averaged 8 units per acre.

Kate Racer, Associate Director for Housing Development at DHCD, noted that 135 projects were built under HOP and that the density for these projects remained stable at approximately 8 units per acre.

Bennet Heart, of the Conservation Law Foundation, suggested keeping the density to 4 times the underlying density.

Mr. Ziegler noted that there is a difference between site that is far away from town and a site that is closer to infrastructure where greater density would be more appropriate. He also noted that determining the surrounding density for rental projects can be difficult.

Mr. Rhuda suggested that the Task Force look at the ratio of open space to floor space to determine density, as a way to really get to smart growth. He noted that this would create higher density housing, preserve woods and trees, and provide a greater buffer for neighbors. He added that looking at density was an “old world” model, and that this approach would be better.

Doug Foy, Chief of the Office for Commonwealth Development, asked Mr. Rhuda if the open space would have to be on the parcel.

Representative Michael Coppola noted that this would help protect wetlands and water resources.

Mr. Rhuda noted that many communities do not count wetlands in their calculations for open space. He added that he is seeing many of the communities that he works with embracing smart growth principals.

Mr. Habib noted that he was hearing a distinction between the appropriate density for urban and rural sites.

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Mr. Foy noted that New York City had a requirement that each skyscraper provided a certain amount of open space on site, and that these spaces proved to be inaccessible and relatively unusable. As a result, New York City changed the requirement to aggregate the open spaces off site, which resulted in more accessible and useful open spaces. Mr. Foy noted that to create legitimate open space in urban settings, it may be more appropriate for the open space to be off site.

Al Lima, Planning Director for the City of Marlborough suggested looking at lot coverage as a guideline.

Mr. Rhuda noted that looking at lot coverage would enable the buildings to spread out on a site. He added that by pushing the buildings closer together, you create a greater amount of open space.

Mr. Heart noted that for rural sites the preference would be to have lower site coverage, but for sites in town centers full lot coverage would be acceptable. He added that infill spaces should be fully developed and that open space should be created in another location.

Howard Cohen, Board member of CHAPA, noted that he was concerned that the Task Force will end up trying to draft zoning ordinances. He suggested that MassHousing develop a set of best practices of what works in urban and suburban situations.

Mr. McLaughlin noted that urban development does not result in as much net new impact as rural development, since in most cases the site already has something on it.

Mr. Rhuda noted that most communities prefer industrial and commercial properties over residential due to the tax revenue they generate.

Michael Jaillet, of the Massachusetts Municipal Association, noted that he supported establishing density guidelines rather than rules so that communities have more flexibility.

Representative Michael Coppola suggested requiring communities to identify land that they consider urban and non-urban, so that when a developer comes in they will know what to expect in density guidelines.

Senator Susan Tucker noted that she didn't think establishing guidelines would satisfy anyone. She noted that if there are no teeth to the guidelines, they would not be worth doing. She added that some communities do not have the expertise or staff to create these zones.

Mr. Cohen responded to Senator Tucker, noting that he had assumed that the subsidizing agency would not issue a site approval letter if the project was inconsistent with the guidelines.



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Mr. Bobrowski noted that some towns have hired landscape architects to develop design manuals for different types of sites.

Judith Alland, representing Marc Draisen of the Metropolitan Area Planning Council, suggested that the guidelines reflect that urban areas need open space too, sometimes more so than suburban or rural areas.

Mr. Habib noted that he had not heard consensus on the issue of density guidelines versus requirements. He added that MassHousing could look at best practices, and evaluate rental & ownership. He added that DHCD will put something together and try to vet it with the Task Force members offline.

Change “cooling off” regulation so that it operates both ways, at the community’s option

Mr. Habib noted that under current regulations, if a developer presents a conventional subdivision plan and is turned down they have to wait 12 months before applying for a comprehensive permit. He explained that this proposal is to adopt the reverse as well, so that if a developer proposes a 40B project and is denied, then they would have to wait 12 months to apply for a conventional subdivision plan.

Representative Michael Coppola noted that the problem the Task Force has heard is that developers are skipping straight to 40B.

Mr. McLaughlin noted that under current regulations you can’t apply for anything for 12 months prior to 40B.

Mr. Rhuda noted that this proposal would take away the rights of individuals to use their land.

Mr. Habib responded that this proposal is trying to get at the “bad apples”.

Mr. Rhuda noted that the “bad apples” comprise only about 5% of the developers, and this proposal would penalize the majority of landowners.

Attorney Kathleen O’Donnell noted that there will always be “bad apples” out there, whether with or without this regulation.

Mr. Bobrowski noted that he believes the current regulation is actually pushing people to do 40B when they really ought to do conventional development.

Mr. Ziegler noted that regulations were developed in response to problems with the New England Fund (NEF), and suggested that perhaps the regulation is no longer necessary because of the state oversight.

Mr. Habib noted that he had heard no support for this proposed change and that he had heard a suggestion for removing the cooling off period.

Both Ms. Gumble and Attorney Kathleen O’Donnell noted that they did not want to see the cooling off period removed.

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Allow project administrator to reprimand developers acting in bad faith

Mr. Habib noted that this suggestion would put some more teeth into what the site approval administrators could turn down.

Attorney Kathleen O'Donnell noted that she fully supported giving more authority to site approval agencies. She added that most of the problems are from old NEF projects.

Mr. Cohen noted that he recalled a Housing Appeals Committee (HAC) case that supported the right of a subsidizing agency to revoke site approval letters. He believed that subsidy agencies already have quite a bit of power.

Mr. Habib suggested that a statement from the Task Force endorsing the authority of the subsidizing agency could be appropriate.

Mr. Jaillet suggested that any reprimands should go both ways to deal with towns acting in bad faith.

Mr. Habib noted that he had heard general agreement from Task Force members on this suggestion, and that DHCD would draft some language.

Recommend offsetting municipal impacts through changes in the local aid formula, provide new local aid for housing growth (or affordable housing growth), adjust School Building Assistance, Chapter 70 and 90.

Mr. Dubuque noted that he was in favor of changing things on this issue. However, he recommended limiting the benefit to communities that develop affordable housing, especially for families.

Representative Harriett Stanley noted that since the additional children brought into local schools from affordable housing remain in the school system year after year, the benefit should not be just a one time deal, rather it should be provided annually.

Mr. Jaillet noted that the fiscal impact of new children generated by affordable housing has been overstated. He added, that if people are truly concerned about finances at local level there are much bigger issues than this. He noted that some additional funding would help, but that it would not cover bigger operational costs.

Representative Harriett Stanley noted that the communities in her district have actually had so much growth from 40B projects they have had to go in for additional funding to build more schools.

Mr. Jaillet noted that affordable housing is desperately needed to support economic development. He explained that while residential development itself doesn't offset its costs, the economic development that can follow does.

Mr. Heart noted that the perception is that this housing creates additional costs for towns. He suggested that this is an opportunity for the state to express its smart growth policy,

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and that the local aid benefit should have criteria for the type of housing that will get the benefit and the type that will not.

Mr. McLaughlin noted that he hears this issue all the time, and that this proposal would serve to disarm the complaint. He suggested that the mechanism, dollar amount, and time, should be left to legislature.

Attorney Kathleen O'Donnell noted that in her experience the ZBAs are typically in favor of projects for families, but planning boards pressure them to approve only projects with no school age children. She added that this results in too many elderly units being built.

Senator Harriette Chandler noted that with the school building assistance program already in jeopardy, these are real concerns from communities, especially those with school children in modular units.

Representative Michael Coppola agreed with the need to provide relief, but noted the lack of trust communities have for state government. He asked if the state would actually fund this.

Senator Dianne Wilkerson noted that at the first Task Force meeting it was stated that one of their tasks was to peel away the misperceptions of 40B and reveal the reality of 40B. She noted that the Task Force should not feel obliged to respond to perceptions, especially on this particular issue since the Task Force has seen that there is no evidence that 40B is driving school children into towns. She added that housing in general brings in children, and did not see a need to provide incentives. Senator Wilkerson also expressed her concern about the slim likelihood that the state legislature would be able to increase SBAB to communities over the next few years. Senator Wilkerson recommended dropping this issue and dealing with the real issues.

Mr. Foy noted that if we are in a place where kids are toxic, that's a huge problem. He noted that California had experienced a significant increase in the number of school age children in their population, and that this would strengthen their economy for future years. He added that he would like to know what the facts support, and asked if the Task Force knew the number of new children by age and the costs of new children. He added that some towns may have an influx of children, while others may have excess capacity. Mr. Foy explained that if certain towns are bearing more of this burden, we have a fundamental need to solve this problem because the economy is so dependent of the ability to keep workers.

Mr. Habib responded, noting that the Task Force has the per pupil costs by community, and the amount of the tab that the state picks up for each community. He noted that independent studies have also been presented to the Task Force on the new per pupil costs. He then suggested that the Task Force could develop data to show that there are costs associated with school operational budgets, and that there are greater costs associated with the construction of new facilities.

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Mr. Heart noted that he believed the administration to be on right track in earmarking chapter 70 local aide. He added that the earmarked funds should favor affordable over market rate development, and favor smart growth.

Mr. Lima noted that he has found that costs associated with new children are not as great as perceived. He explained that the city of Marlborough has asked developer to provide a fee for each unit to go into housing trust fund, which would allow city to buy its own land and work with non-profits.

Ms. Gumble noted that it seemed like Mr. Lima was saying that the costs associated with new school age children were not that significant, and asked him if this was indeed what he had meant.

Mr. Lima confirmed that was what he had meant, and noted that he had been talking about rental developments. He noted that costs associated with ownership development would be greater.

Representative Harriett Stanley suggested that the state should encourage affordable housing by putting an additional column on the local aid page that says that communities that have reached 5% get a bonus. She suggested that the state should “put the money where its mouth is.”

Representative Michael Coppola noted that the density currently allowed with 40B can put a great deal of children into a community too quickly for the community to be able to provide for them. He noted that communities develop master plans based on current zoning, and build infrastructure based on that zoning. He added that those plans get messed-up when 40B comes into play.

Mr. McLaughlin agreed with Representative Michael Coppola that the impact of 40B development is tangible, but not as great as the Representative suggested.

Ms. Alland noted that it is misleading to say that there would be new money for this; the money has to come from somewhere, and asked that the report of the Task Force reflect that.

Mr. Habib noted that the report will respond to the requests of the task force. He added that he had heard that there is request for new local aide for this measure, though the reality of that would be another issue.

Attorney Kathleen O'Donnell noted that it was not the responsibility of the Task Force to determine the likelihood of the availability of additional funding.

Mr. Heart noted that the likelihood of additional funding would be a trust issue.

Representative Harriett Stanley noted that the Task Force should present ideal solutions.

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Senator Bruce Tarr suggested looking at the new growth aide account, and look at ways to provide incentives for 40B. He added that communities should not be competing for funds that they already get.

Mr. Foy asked how many kids enter kindergarten annually, and suggested that it could be that the impact is distributional rather than net. He noted that California's population of children is growing faster than Massachusetts', which is good for California's economy. He added that the fact that Massachusetts' population of children is static, will prove harmful.

Senator Susan Tucker noted that the Task Force needs to recognize communities that have recently done affordable housing. She explained that she didn't want to penalize the communities that have already been doing a good job.

Senator Harriette Chandler pointed out that when looking at the number of new children generated by new construction, the number of bedrooms is a significant factor.

Mr. Habib noted that it appears that this section is developing into a narrative of the number of children per unit, and the distribution of the new kids per community. He noted that he had heard support for targeting Chapter 70 aide for new units over time.

Planned production and linking planning to Chapter 40B (time-off for planning)

Mr. Bobrowski asked Task Force members to direct their attention to a document titled "Chapter 22" (Rhode Island's comprehensive planning statute) and the copy of the 1982 HAC Hingham decision. He noted that Massachusetts has never had a link between planning and zoning, but most of the rest of the country does. He explained that Rhode Island requires communities to have planning documents, which must be officially adopted. He noted that the state pays for the plans, and requires that local zoning match the plan.

Mr. Bobrowski explained that the HAC decision from 1982 is well known for establishing that local plans including affordable housing components can be grounds for turning down a comprehensive permit application that is inconsistent with local needs. He noted that this invitation to communities has been out there since 1982. He added that the current regulations for .75% progress further invite communities to plan for affordable housing. He then noted the need to provide communities with an incentive, and explained that .75% progress is a tough number for many communities that he works with to achieve. He suggested that the .75% progress should be reduced to a more achievable number.

Mr. Bobrowski also noted that under current regulations units can count toward a community's subsidized housing inventory when the comprehensive permit becomes final. He noted that he believed this to be problematic and suggested that units should count when permit is issued. He also suggested extending the period for the building permit to be issued before the units are removed from the count from one year to two years.

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Mr. Habib noted that it sounds like Mr. Bobrowski supported the planned production regulation but wanted the percentage lowered, wanted the units to count when a comprehensive permit was issued, and wanted to allow two years for building permits to be issued.

Mr. Ziegler noted that the intention of the planned production regulation is to provide towns with a safe harbor, and added that he was personally comfortable with the legislature's number (.5%). He then explained that he did not think that this was an either-or case, and noted the need to acknowledge that towns with certain circumstances may prevail.

Mr. Heart supported the idea of finding a number that is attainable, and noted that 5% may be better than .75%.

Mr. Foy noted that he had another engagement and would have to leave. He thanked everyone for participating, and noted that he hoped that the task force would make the deadline. He explained that the legislature had put all the bills related to 40B on hold, and if the task force failed to meet its deadline the pressure from the legislature would be quite significant.

Mr. Cohen noted that 40A can trump 40B when multifamily is allowed. He then suggested that for the planned production regulation the number of units required of communities that are at 8% should be less than the number of units required of communities that are below 2%.

Mr. Habib noted that he had distributed comments from the town of Brookline that speak to this issue, and asked Roger Blood of the Brookline Housing Advisory Board to explain Brookline's proposal.

Mr. Blood explained that Brookline's recommendation is that the number of units required under the planned production regulation should be a fraction of the number of the remaining units that each town would need to get to 10%. He suggested that if a community can close 10% of its remaining gap over a two-year period, then they should get time off. He noted that this sliding scale would provide incentives for communities that have done little for affordable housing.

Senator Dianne Wilkerson noted that she hoped to hold cities and towns responsible to the same minimum standards knowing that they have varying levels of resources. She explained that it wasn't fair to hold cities and towns with no resources to the same standard as towns with greater resources. She noted that the state has an obligation to provide those resources. She supported developing a requirement to tie plans with zoning.

Attorney Kathleen O'Donnell noted the need to reinforce the fact that communities need to do a plan if they do not want to be subject to 40B. She expressed concern that when we go through lull in development people will forget about the planning option, and then be unprepared and alarmed when housing development has resurgence.

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Mr. Dubuque supported tying plans to zoning, though he was concerned that sufficient guidelines have not been provided for what will be considered appropriate plans.

Mr. Bobrowski pointed out that under current regulations the plan must include production. He then added that when the .75% requirement is 178 units for a town, they can't realistically achieve that for more than one year.

Mr. Habib asked Task Force members if there was consensus to reduce .75%. There was no consensus on this issue.

Representative Harriet Stanley reminded Task Force members that .75% had been a compromise.

Mr. Rhuda noted that he had seen many municipalities establish building moratorium while they develop their master plan. He noted that the more we allow excuses, the more 'bad actor' communities will be able to get out of affordable housing.

Senator Bruce Tarr suggested that DHCD should develop a process for certifying that a community's zoning and affordable housing plan could be reconciled. He also suggested a tiered structure for planned production, where if a community has 0% as the subsidized housing inventory percentage they would need to do .75% progress, but they would need to do fewer units if they have higher percentage. He supported Brookline's proposal.

Attorney Kathleen O'Donnell also supported Brookline's proposal.

Mr. Habib suggested investigating Brookline's proposal and Senator Tarr's proposal.

### Profits

*Establish guidelines for allowable acquisition cost for land so that acquisition costs cannot be used to inappropriately inflate profits*

Anne Marie Gaertner, Senior Policy Advisor for the Department of Housing & Community Development explained that the problem is land values increase over time and that land value becomes much higher with 40B than under existing zoning. She explained that these guidelines would be in response to the NEF, and would provide that the allowable acquisition cost cannot be unreasonably greater than value under existing zoning, which would inflate the allowable profit. She explained that this more clearly identifies the allowable acquisition cost. She noted that the proposal would be to allow this to apply to across the board. She then added that this would allow the community to realize the value of the comprehensive permit, rather than an individual.

Senator Dianne Wilkerson asked for clarification of the issue with allowable profits.

Mr. McLaughlin cautioned that this could be a slippery slope. He explained that typically a developer must acquire land through an arms length agreement, and the seller of the land will sell to whomever can give them the best price. He noted that due to the inherent risks and time commitment with 40B, it isn't appropriate to tie the value of the land with what is allowed by right. He added that he supports transparency, and noted that the

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price paid for a piece of land shows up in the pro-forma. He noted that land value could not be artificially controlled.

Attorney Kathleen O'Donnell suggested tightening the regulations to require that you show the appraised value of the land or arms length agreement.

Mr. Cohen noted that a lot of these problems came out of NEF when the banks didn't know what they were doing. He added that now that MassHousing is in charge of site approval letters, their site review would catch this.

Mr. McLaughlin noted that the price should be the last purchase price of the land.

Attorney Kathleen O'Donnell noted the need to clarify this issue and make sure that the language is tight, to ensure that the abuses that happened under the NEF do not happen again.

Mr. Habib asked the Task Force if they supported requiring an appraisal of the land.

Ms. Gaertner noted that the NEF guideline regulation is very close to MassHousing's policy & has a built in protection for reasonable carrying costs. She noted that the Task Force had heard one example this type of abuse where a parcel under agreement would get greater price depending on the number of units approved.

Mr. McLaughlin clarified that it is standard practice for the price of land to be dependant upon the number of units approved.

*Establish guidelines for allowable acquisition cost for land so that acquisition costs cannot be used to inappropriately inflate profits*

Mr. Habib noted that the Task Force had heard concerns that developers were making too much profit off of 40B projects. He explained that some cities and towns have wanted to review the pro-forma, but that right now the pro-forma is reviewed by the subsidizing agency. He noted that there has been a proposal to provide for a third-party with the expertise to review the pro-forma.

Mr. McLaughlin noted that the site approval application contains financial information, which is available to the town. He expressed concerned that a third party review would be problematic, and asked what would happen if the third party reviewer questioned the proforma.

Attorney Kathleen O'Donnell noted that this issue was really an NEF problem that had already been addressed by the regulations passed by DHCD.

Mr. Ziegler noted that he believed the Task Force may have made this issue something greater than it really is. He explained that the numbers are not secret, at least at MHP. He noted that all that is needed is some honest give and take between ZBA and developer. He expressed concern with making it sound like the numbers are inaccessible.

There was consensus amongst Task Force members not to adopt this proposal.



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Limit profits to 10% or 15%

Mr. Rhuda noted that reducing allowable profits to 10% or 15% would eliminate any homeownership development, because banks wouldn't finance them.

Jacques Morin, of Bayberry Building, noted reducing the profit to below 20% would make it much less likely that a project would be financed.

The Task Force members agreed to not adopt this proposal.

Require financial evaluation of each additional unit over the number of by-right units

Mr. Habib explained that this proposal would require a financial evaluation of the need to do greater density to be economically feasible.

Mr. Cohen noted that the intent was never to have to prove the need for greater density, rather it was to allow a reduction in the density if there were valid concerns.

Require an income band in 40B developments to serve lower income people

Mr. Habib noted that the Task Force had heard that the market rate units in 40B developments are priced to offset the costs of the affordable units.

Senator Bruce Tarr noted that this should be an issue for the ZBA to negotiate.

Mr. McLaughlin noted that he had done some projects that include income bands. He explained that the income bands served to provide coordination between the affordable units and the use of section 8 vouchers. He added that he personally supported promoting income bands.

Senator Harriette Chandler noted that the problem is that communities do not know that this is their right to negotiate. She suggested reminding them that they can do this.

Representative Harriett Stanley noted that this would be more responsive to local need.

Mr. Rhuda noted income bands would not be feasible for ownership projects.

Attorney Kathleen O'Donnell suggested counting all ownership units in projects where 25% of the units consisted of a combination of units that were affordable to households earning 120% AMI and households earning less than 60% AMI.

Mr. Dubuque noted the need to try to achieve affordability for people at 60% and 50% AMI.

Mr. Habib suggested investigating this trade-off.

Mr. Lima suggested recommending funding for a technical assistance manual that lets ZBAs know what is possible, what they can do.

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CHAPTER 40B TASK FORCE

FINAL MINUTES OF THE MAY 5, 2003 MEETING

Senator Harriette Chandler suggested that the technical assistance manual be placed online. She noted that a lot of communities have no idea what 80% AMI is for their town.

Mr. Habib noted that this would work with the website proposal from last week.

Senator Dianne Wilkerson noted that there has been a discussion that in Boston people were trying to sell homes that they had purchased long ago that carried deed-restrictions, were not aware that they would be limited in what they could sell it for. She noted that the problem is that the years of paying the mortgage and taking care of the property, garnered no appreciation.

Support changing the CPA to allow for cities and towns to set aside a pot of money to purchase units when they become available

Mr. Habib asked if there was support for the proposal to buy more affordable units or buy greater affordability with CPA money.

Mr. McLaughlin noted that there is a very delicate balance developing affordable housing and that it is much easier to do during good housing market conditions.

Mr. Dubuque noted that it was reasonable for communities to buy greater affordability with resources they have.

Senator Harriette Chandler asked if there was information showing the number of people who are being denied 3-bedroom housing.

Lynn Sweet of LDS Consulting LLC, noted that the problem is that towns are discouraging 3-bedroom apartments in favor of 1 and 2 bedroom apartments due to the school age children issue. She explained that this results in more families staying in hotels and motels. She suggested encouraging towns to build 3-bedroom apartments.

Attorney Kathleen O'Donnell noted that her suggestion had been to allow communities to buy greater affordability.

Mr. Jaillet noted that from the town's perspective, the problem is the school age children and not the affordability of the units. He added that 3-bedroom units are greatly needed, and that the Task Force should provide an incentive for communities to do 3-bedrooms units. He noted the need to take away the school children issue for the ZBA

Mr. Habib noted that the next meeting would include a discussion of smart growth and things outside 40B.

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT  
DEPARTMENT OF COMMUNITY AFFAIRS  
HOUSING APPEALS COMMITTEE

HARBOR GLEN ASSOCIATES

V.

BOARD OF APPEALS OF THE TOWN OF HINGHAM

No. 80-06

DECISION

August 20, 1982

Housing Appeals Committee

Maurice Corman, Chairman

John Carney, Counsel

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COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT  
DEPARTMENT OF COMMUNITY AFFAIRS  
HOUSING APPEALS COMMITTEE

HARBOR GLEN ASSOCIATES,  
APPELLANT

V.

BOARD OF APPEALS OF THE TOWN OF HINGHAM,  
APPELLEE

DECISION

I. STATEMENT OF PRIOR PROCEEDINGS

This is an appeal from the decision of the Board of Appeals of the Town of Hingham<sup>1</sup> denying an application for a Comprehensive Permit to build low or moderate income housing.

The Appellant, Harbor Glen Associates<sup>2</sup>, a limited dividend developer, on February 25, 1980 submitted

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<sup>1</sup>Hereinafter variously referred to as the "Board", the "Appellee" or the "Respondent".

<sup>2</sup>Hereinafter variously referred to as the "Developer", the "Appellant", the "Petitioner", or the "Applicant".

this application to the Board for a Comprehensive Permit to construct 288 units of housing on a 36.2 acre site, a portion of the former Hingham Ammunition Depot, in Hingham. The application was filed under the provisions of Chapter 774 of the Acts of 1969<sup>3</sup>.

The Board gave due notice, as required by the Statute, conducted a public, administrative hearing and, by decision dated June 2, 1980, denied the application.

From that denial, the applicant filed this appeal to the Housing Appeals Committee<sup>4</sup>. The Committee convened a conference of counsel, conducted a site view, and on October 16, 23, November 18, December 9, 1980, and January 22, 1981, conducted a public hearing at the Hingham Town Hall. This hearing, as required by the Statute, was conducted as an adjudicatory hearing. Witnesses were sworn, full right of cross-examination was afforded the parties, and a stenographic record of the proceedings was kept.

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<sup>3</sup>St. 1969, c. 774; now G.L. c. 40B, ss 20-23, hereinafter referred to as the "Statute", or "Chapter 774". References to a section, as "Section 20", refer to that section of G.L. c. 40B.

<sup>4</sup>Hereinafter referred to as "HAC", or the "Committee".

II. ISSUES

As provided in Section 23 of the Statute, the sole issue before the Committee is whether or not the denial by the Board was "consistent with local needs". What constitutes "consistent with local needs" is defined in Section 20 of the Statute, and in greater detail in the Hanover case<sup>5</sup>. If the denial by the Board is consistent with local needs, the Committee has no jurisdiction to reverse it.

In brief, the decision by the Board is deemed "consistent with local needs" if the Town has already met certain minimum criteria with respect to the number of low or moderate subsidized housing units already existing, the area occupied by such units, or the area to be occupied by such units which are slated for construction in the upcoming year.

The Town does not argue that it has met any of these criteria.

The Board's decision may still be deemed consistent with local needs if it can be shown that

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<sup>5</sup>Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339 (1973). The leading case. Hereinafter referred to as the Hanover case, or "Hanover".

the proposed development involves health or safety hazards, or valid planning objections, of gravity sufficient to outweigh the regional need for this housing, together with the number of low-income persons in Hingham.

It is on this broad ground, generally, that the Board argues that its denial of the Comprehensive Permit is "consistent with local needs", and that therefore it cannot be reversed by the Committee.

We find, on the record, that the Appellant is a limited dividend developer as required by the Statute, that it has the requisite property interest in the site, and that it has met the preliminary requirements for subsidy financing with the Massachusetts Housing Financing Agency to qualify it to maintain this action. We find further, on the record, that the issues of regional housing need, and the number of low-income persons in Hingham, have been sufficiently proved to satisfy the requirements of the Statute. We find further that while 36.2 acres exceeds the statutory limit for this type of construction in a single year, this objection could be resolved by a condition attached to the Comprehensive Permit which



the Appellee is amenable, and for which there is precedent in previous decisions of the Committee, affirmed by the Supreme Judicial Court<sup>6</sup>.

A. Health and Safety Factors

As indicated, where the Town has not met any of the mathematical criteria relating to consistency with local needs, it may still show that its denial is consistent with local needs in that health, safety or valid planning objections exist that outweigh the regional housing need.

The language of the Statute (Section 20) and the discussion in "Hanover" (supra, fn. 5) in effect divide these factors into two groupings usually referred to as "health and safety factors" and "valid planning objections".

The only issues raised in the area of potential health and safety hazards were (1) the capacity of the existing private sewer system to handle the sewage from the 288 apartments, and (2) the legal right of the Appellant to maintain the license agreement with the Town for the private sewer main to cross public property.

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<sup>6</sup>Board of Appeals of Maynard vs. Housing Appeals Committee (1976) 345 NE 2nd 382, 385.

We find, on the record, that the existing private sewer line, the Hingham sewer system, and the MDC pumping are adequate to handle the burden from this development, and indeed other pending developments on the drawing board, or can be made so at very little expense<sup>7</sup>. We agree also with the Appellant that the possibility that the privilege to cross public property with a private sewer line might be revoked by the Town is too remote to contemplate. Such an action by the Town would be a classic example of a restrictive requirement which could be set aside on application to the Committee<sup>8</sup>.

B. Planning Objections

We find, on the record, that the site plan and building layout and design have been excellently conceived and executed, with sensitive concern for the critical aspects of the site, its relationship to the Weymouth Back River, the eight to nine acre tidal marsh in the central portion, and the dominant esker in the southern portion of the site. Parking is adequate, and drainage has been designed so that it

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<sup>7</sup>See Transcripts: Nov. 18 at pp. 97-99; Jan. 20 at pp. 8, 13, 22; Exhib. 6, App. 2.

<sup>8</sup>"Maynard" (see fn. 6 supra) at pp. 385-386.

does not run off into the tidal marsh - a matter of concern to the Hingham Conservation Commission. The excellence of the overall design reflects the particular familiarity with this area of the architect, Samuel Nuckols, and the firm, Sasaki Associates. This firm had prepared the master site plan for the adjacent Beals Cove Village apartment complex<sup>9</sup>.

The major point of difference between the parties is the extent to which the use planned for this site by the Developer conflicts with its planned use as an Office Park, as envisioned in the Town's Depot Study and consequent zoning amendments. Because that is the critical issue, and because our decision in this case turns on that issue, we discuss that planning factor in greater detail under a separate heading.

1. The Depot Study and 1971 Zoning Amendments

The Board's decision emphasizes that the zoning developed for the area of which this site is a part did not follow the procedure which generally is characteristic of establishment of most zoning districts. Generally such areas are already substantially developed; there is little or no

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<sup>9</sup>Transcript (Oct. 16) pp. 12-17; Exhibits 5, 17.

opportunity to apply desirable concepts of land use planning; and the typical zoning boundaries simply reflect the previous growth patterns.

With respect to the 750 acres which formerly comprised the Hingham Naval Ammunition Depot, and where our site is located, this usual situation did not apply. When the Navy declared this property to be surplus, an unusual opportunity for a well-planned development of the area was presented to the Town. Fresh in the minds of the townspeople was the experience of the unplanned, unrestrained and uncontrolled development which had occurred in the former Hingham Shipyard area north of Route 3A.

The efforts of the Selectmen to respond to this opportunity are documented throughout the record. A special committee, the Ammunition Depot Study Committee, was appointed; six individuals with experience in real estate, property management, conservation and planning. The Committee retained Charles E. Downe, a highly reputable professional planner. The planning process studied the physical characteristics of the tract, uses in adjacent areas, road, rail and waterway systems, wetland and wildlife

concerns, and suitability of septic tank disposal systems. Information gathering and analysis included consultation with various groups, both within and outside the town, public meetings and extensive discussions. Concern for community needs was reflected in the areas of open space, park land, space for educational facilities and need for an office park.

The need for multi-family housing was addressed, and in particular, housing under Chapter 774<sup>10</sup>.

The planning process resulted in the evolutionary development of a series of five "concept" plans. The recommendations were embodied in the present zoning of the 750 acres which was approved at the 1971 Town Meeting<sup>11</sup>.

The entire 750 acre tract was rezoned from industrial to a variety of uses. Four hundred sixty acres were set aside for park land. The remaining 300 acres were devoted to single-family residential, multi-family residential, school, open space and office

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<sup>10</sup>Transcript (Oct. 23) pp. 35-39; Exhib. 21, p. 5; Exhib. 21A.

<sup>11</sup>Transcript (Oct. 23) pp. 20-25, 28, 31. (Nov. 18) p. 75, (Dec. 9) pp 4-5; Exhibits 18, 19, 20, 21.

park. Small parcels were set aside for a drug rehabilitation center and a conservatory of music.

Eighty-five acres were allocated to multi-family housing. Of this amount, 58 acres have been built upon or approved for multi-family housing, including 27 acres on which the Town has already granted a Chapter 774 Comprehensive Permit for 196 units of subsidized housing, leaving 27 acres for further subsidized housing (Exhibit 7).

The zoning which embodies the Committee's planning recommendations placed an office park in the northwest corner of the 750 acre tract in the roughly triangular area formed by Weymouth Back River, Route 3A and Beal Street. This area comprises 44 acres. The site on which Harbor Glen proposes to erect these 288 units covers 36.2 of the 44 acres.

The Board argues that the office park was placed in this area because of considerations which made it the best location for an office park in the 750 acre tract, particularly because of the proximity of the shipyard area north of Route 3A, and the mushrooming of industries there. The Board argues further that leaving only eight acres would not be enough for an

office park, that its careful planning would be frustrated, and that among other things the Town would be hurt in the deprivation of the enhanced tax revenues that had been anticipated from the designated land use. The Board points out in its decision that any change in the overall plan will inevitably have an impact on the balance of the plan.

In particular the Board argues that it was not the intention of the Legislature in enacting the Chapter 774 program to grant Comprehensive Permits in all cases where a town had not met its 774 "quota", particularly in a case like the present one where the Town had no past history of opposition to low or moderate income housing, and where the granting of such a permit would subvert careful planning efforts in which Chapter 774 needs had been specifically addressed.

The Developer points out, on the other hand, that an "Office Park" zone is not needed to the extent that the housing is needed, that business and professional offices are a permitted use not only in an "Office Park District" but also in Business A Districts, Business B Districts, Waterfront Business Districts,

Industrial A Districts, Industrial B Districts and in Industrial Parks, all of which districts actually exist elsewhere on the Hingham Zoning Map - Part A.

The Town has argued that a major planning consideration in designating this area as an Office Park was its "buffering" effect between adjacent residential areas and the heavier industrial development in the shipyard. The Developer counters by pointing out that sufficient "buffer" areas already exist in Beal Cove Park, the remaining eight acres of the Office Park and the football field, and that the use of the site for residential purposes is fully compatible with existing adjacent uses.

This case squarely presents the Housing Appeals Committee the issue of the weight to be given to a Master Plan which is in contravention of the land use sought by an applicant for a Comprehensive Permit. The handling of this issue by the Committee in previous cases indicates that there is no categorical answer. The Committee looks to legislative intent, both in Chapter 774 and in the zoning laws. In the process of weighing the housing need against valid planning objections, certainly a Master Plan is a valid planning



factor which must be so weighed; but in our interpretation and administration of Chapter 774, it is no more than that. Where the Master Plan is totally unrealistic with respect to present land uses or reasonably potential future uses, where there is more than a suspicion that the Master Plan is simply a sophisticated maneuver to perpetuate precisely the abuses which Chapter 774 was designed to eliminate, where the Master Plan is simply an ancient planning exercise, ignored and gathering dust for years, and now dusted off to frustrate housing for which there is a clearly demonstrated need, the Master Plan will not prevail in the weighing process.

We do not, however, find on the record, that any of these objections, or any similar objections, can be raised against the Ammunition Depot Plan that gave rise to the current zoning of this area. The carefully selected committee, the impeccable credentials of the selected planner, Charles E. Downe, the prolonged process of public discussion of all issues and public needs, reduce almost totally the likelihood of any second guessing by the Housing Appeals Committee. As indicated in the Board's decision, this was not the

usual zoning situation of freezing in place an existing status quo, or of subtly using the zoning laws to exert negative pressure against the building of low or moderate-income housing. It was a unique planning opportunity in that the sudden availability of a 750 acre undeveloped tract in a built up neighborhood presented a "tabula rasa" for bold and imaginative urban design. In particular, we are impressed by the fact that where 460 acres of this tract were set aside for park land, of the remaining 300 acres, 85 acres, more than 25 per cent, was set aside for multi-family housing, which includes Chapter 774 housing. This was in the early 1970's. Chapter 774 was passed in 1969. The attitude of most towns toward the "774" program at that time was bitterly hostile. There were not too many examples of towns zoning at that time to facilitate provision of low or moderate income housing.

With 27 acres of that land still available for this housing under the existing zoning, it is difficult for this Committee, in the weighing process, to justify a change in the Master Plan which in effect would wipe out the provisions in that plan for an Office Park.

Several additional arguments raised by the developer should be addressed. The developer has argued that because a hotel or motel could be erected by special permit in the Office Park, in effect, this zoning regulation has not been applied as equally as possible to both subsidized and unsubsidized housing under Chapter 774. We do not construe a hotel or motel to be "unsubsidized housing" in the sense contemplated by the Statute. It is a commercial enterprise primarily, not "unsubsidized housing" in any permanent or practical sense, and the implication in the local zoning that it may well be a compatible use in an "Office Park" district is not one we would quarrel with.

A weightier argument raised by the developer has its genesis in the "Marketability Report" of Meredith and Grew prepared in 1971 (Exhibit 21, Appendix B). That report indicated that demand for office or industrial space in this area would be of a local nature, not New England-wide, and that the development thrust in this area should be directed toward housing of all types. The developer points out that in the intervening decade, no office space has been developed

in this Office Park District while much office space has been built in other industrially zoned land in Hingham nearby by Route 3.

It may well be, in retrospect, that the Office Park District is not going to attract office space development, for whatever reason, and that it should be rezoned. If that turns out to be so, procedures exist for bringing that about in a reasoned and orderly fashion, and this Town has certainly demonstrated its willingness and competence to utilize that process. An application through Chapter 774 is not the way. While this Committee has not, in numerous other cases, shrunk from in effect bringing about such a result in carrying out the mandate of the Legislature in Chapter 774, this is not such a case.

Our decision in this case makes it unnecessary to rule on the motion, filed by the Developer after the formal hearing and contested by the Board, in which the Developer sought to change the original proposal from all rental units to a combination of condominiums and subsidized rental units.

III. RULING

On the basis of our subsidiary findings and rulings, and on the whole record, we rule that the denial of the Comprehensive Permit was consistent with local needs. The decision of the Board of Appeals of the Town of Hingham is upheld.

HOUSING APPEALS COMMITTEE

Maurice Corman  
Maurice Corman, Chairman

C. William Dwyer

Date: August 20, 1982 Susan Schum

## CHAPTER 22

### LOCAL PLANNING BOARD OR COMMISSION

<p>SECTION. 45-22-6. Comprehensive plan — Formula- tion and adoption.</p>	<p>SECTION. 45-22-8. Reports.</p>
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**45-22-6. Comprehensive plan — Formulation and adoption.** — A planning board or commission shall prepare a comprehensive plan for the development of the city or town. Such a plan shall, among other things, show the general arrangement of and goals, objectives and standards for land use, transportation routes and facilities, public facilities and services, renewal or rehabilitation programs, housing programs, including cooperative housing programs not limited to but also involving limited equity cooperative housing designed for low and moderate income residents, conservation areas, historic preservation areas and environmental protection programs, together with a recommended program of actions and improvements deemed necessary to implement the features of said plan. The planning board or commission may, at its discretion, hold public hearings on the comprehensive plan or any elements of the comprehensive plan. The comprehensive plan and all elements thereof shall be in general conformity with the goals, objectives, policies and general arrangements contained in applicable state plan or element thereof.

The planning board or commission shall adopt said comprehensive plan or elements thereof and shall, upon adoption, use said plan or elements thereof as a guide to its actions in areas relating to the adopted plan or elements. At intervals of no greater than five (5) years, the board or commission shall review said comprehensive plan or elements thereof and make any modifications, amendments or additions deemed necessary in the light of current and projected community development trends and needs.

Following adoption of a comprehensive plan or any element thereof by the planning board or commission and upon recommendation of said board or commission, the city or town council may, following a public hearing, adopt said comprehensive plan or element thereof as a statement of city or town policy and a guide for community action in matters relating to community development. Any comprehensive plan or element thereof may be modified or amended by said city or town council following a public hearing. Any such proposed modification or amendment shall be referred to the planning board or commission for its recommendation at least thirty (30) days prior to the date of the public hearing by the city or town council. Failure of the planning board or commission to forward a recommendation to the city or town council within the thirty (30) day period

shall be deemed an approval of the proposed modification or amendment by the board or commission. The affirmative vote of at least two thirds ( $\frac{2}{3}$ ) of the city or town council shall be required to adopt any modification or amendment to the comprehensive plan or element thereof where the planning board or commission has rendered an adverse recommendation.

Any comprehensive plan or element thereof which has been adopted by a city or town council prior to May 4, 1972 shall be considered adopted for the purposes of this chapter, however, any adoption, modification, or amendment of a comprehensive plan or element thereof subsequent to [May 4, 1972] shall be made in accordance with the procedures and requirements set forth in this chapter.